

No. 20006

In the
United States Court of Appeals
For the Ninth Circuit

LUIGI BAFICO,
Appellant,

v.

SOUTHERN PACIFIC COMPANY,
Appellee,

v.

DAD'S ROOT BEER BOTTLING COMPANY
OF PORTLAND, OREGON,
Third-Party Defendant.

*See also
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PETITION FOR REHEARING

On Appeal from the United States District Court
For the District of Oregon
HONORABLE WILLIAM G. EAST, Judge

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Plaintiff respectfully petitions this Honorable Court for a rehearing of this cause on the ground that the opinion of the Court heretofore given is erroneous in the following respects:

I.

The Court's opinion overrules *Hicklin v. Anders*, 201 Or 128, 253 P2d 897, 269 P2d 521 (1954) where it was held that releases must be given effect according to the intention of the parties.

II.

The Court's opinion overrules *Keadle v. Padden*, 143 Or 350, 20 P2d 403, 22 P2d 892 (1933) where it was held that a litigant who was not a party to the written agreement upon which he seeks to rely, may not prevent the introduction of parol evidence to establish the intention of the parties to the agreement.

III.

The sum of \$16,500 gross is not a large sum for compromise by Dad's Root Beer Company of Portland of a permanent injury and whether it is settlement in full for Mr. Bafico should be a question of fact for Mr. Bafico's jury.

IV.

The Court by this decision instead of continuing to take the lead in advancing the law in the area of releases will be retreating toward the common law rule that the release of one joint tort-feasor releases all, regardless of intention or written reservation.

V.

To place this Court's decision on the basis that both the tort-feasors are released upon the release of one where, as in the case at bar, the negligence of the tort-feasors materialized in a single accident rather than, as in *Rudick v. Pioneer Memorial Hospital*, 9 Cir., 1961,

296 F2d 316, where there were two occurrences of negligence separate in time and space, adds further complication to an area of law which already is complex, and raises the question of whether, when there are two occurrences of negligence separate in time and space, there can be joint-feasors.

VI.

At the time Mr. Bafico signed the Dad's Root Beer release, the Southern Pacific Company was not a corporation *charged* with responsibility for injuries to Mr. Bafico and as a result the language of the Rudick release would be stronger language for this defendant's position.

VII.

The trial court and this Court had no basis in the record for the inference that Mr. Bafico knew what he was doing (releasing the Southern Pacific Company) when he signed the release for Dad's Root Beer, simply because the release was signed in the presence of his counsel.

VIII.

Mr. Bafico, the real party in interest, did find this release to be ambiguous.

IX.

The law in Oregon on uncommunicated mental reservations, as set out in *Wheeler v. White Rock Bottling Co.*, 229 Or 360, 366 P2d 527 (1961), applies only as between the parties to the release and is not authority for the finding that any uncommunicated mental reservations between the parties to the release inures to the benefit of a third party not in privity or that any reservation, mental or otherwise, about another tort-feasor must be communicated to the released tort-feasor in order not to be waived.

X.

This Court, through Judge Hamlin, Judge Merrill, and Judge Koelsch, has previously considered and rejected in the Rudick case the arguments advanced and the authorities cited by appellee, including *Wheeler v. White Rock Bottling Company*.

Respectfully submitted,

MARTIN SCHEDLER,

Attorney for Appellant

I hereby certify that in my judgment the within petition for rehearing is well founded and is not interposed for delay.

Attorney for Appellant
MARTIN SCHEDLER

